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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Devin Andrich,

10 Plaintiff,

11 v.

12 Keith Dusek,

13 Defendant.  
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No. CV-17-00173-TUC-RM

**ORDER**

15 Pending before the Court are Defendant Keith Dusek's Motion in Limine re:  
16 Spoliation (Doc. 400), Plaintiff Devin Andrich's Request for Order to Show Cause (Doc.  
17 410), and Plaintiff's Request for Judicial Notice (Doc. 414).

18 **I. Motion in Limine re: Spoliation**

19 Defendant moves (1) to preclude Plaintiff from arguing or offering testimony or  
20 evidence that Defendant or anyone at the Arizona Department of Corrections ("ADC")  
21 spoliated any evidence, and (2) to preclude Plaintiff from seeking to draw an adverse  
22 influence from the absence of form 804-3 Individual Inmate Detention Records (a.k.a.  
23 "pod sheets") being offered at trial. (Doc. 400.) Plaintiff filed a Response in opposition  
24 (Doc. 412) and later filed a supplemental Response (Doc. 415).

25 **A. Background**

26 Plaintiff previously filed a Motion for Spoliation Sanctions, asserting that  
27 Defendant Dusek and prior Defendants intentionally withheld and destroyed form 804-3  
28 records of Plaintiff's opportunities to shower and exercise while in the detention unit.

1 (Doc. 257.) Plaintiff cited to deposition testimony indicating the records are retained in  
2 hard copy for approximately two years after an inmate is moved from the detention unit  
3 to the general population, and he argued that Defendants had notice of his claims in this  
4 lawsuit within two years of his transfer from the detention unit. (*Id.*) Plaintiff asked the  
5 Court to sanction Defendants by striking Defendants’ Motion for Summary Judgment and  
6 entering default against Defendants on certain counts, or alternatively instructing the jury  
7 that Defendants had destroyed evidence that “would show that Defendants’ staff required  
8 Plaintiff either to accept out-of-cell recreation time in freezing temperatures without a  
9 sweater, jacket or stocking cap, or forfeit his out-of-cell recreation time.” (*Id.* at 20.)  
10 Defendants’ Response to Plaintiff’s Motion for Spoliation Sanctions argued that  
11 Plaintiff’s Motion was untimely and that the form 804-3 records are irrelevant and would  
12 not have altered the Court’s summary judgment ruling. (Doc. 262.)

13 On January 21, 2021, the Court denied Plaintiff’s Motion for Spoliation Sanctions.  
14 (Doc. 273.) The Court found that the form 804-3 records would not have changed its  
15 summary judgment ruling, that Plaintiff had failed to explain his delay in moving for  
16 spoliation sanctions, and that Plaintiff had failed to show that Defendants or defense  
17 counsel had acted willfully or in bad faith. (*Id.* at 4-6.)

18 **B. Discussion**

19 Defendant argues that, based on the findings of the Court’s January 21, 2021  
20 Order, Plaintiff should not be allowed to elicit testimony or offer evidence to suggest that  
21 the form 804-3 records were improperly or culpably destroyed. (Doc. 400 at 1-2.)  
22 Defendant further argues that Plaintiff should not be permitted to seek an adverse  
23 inference instruction or to argue to the jury that ADC “employees and/or Defendant were  
24 hiding information by not producing and/or by routinely destroying the pod sheets.” (*Id.*  
25 at 2.) Defendant argues that an adverse inference is improper here because he had no  
26 responsibility or authority to maintain the form 804-3 records. (*Id.* at 2-3.)

27 In response, Plaintiff argues that there is no dispute that either Dusek or former  
28 Defendants destroyed or otherwise failed to preserve Plaintiff’s form 804-3 records

1 despite actual knowledge of this lawsuit. (Doc. 412 at 4, 8.) Plaintiff further argues that  
2 the Court should issue adverse inference instructions regarding the “adverse action” and  
3 “chilling effect” elements of his First Amendment retaliation claim due to the suppression  
4 or destruction of the form 804-3 records and Defendant’s failure to produce a November  
5 24, 2015 email allegedly sent by Dusek to the prison mental health department.<sup>1</sup> (*Id.* at  
6 7-9.) Plaintiff avers that he will not seek to argue that Dusek destroyed Plaintiff’s form  
7 804-3 records. (*Id.* at 9.) However, he argues that Dusek knew to preserve the records  
8 when he was served with Plaintiff’s lawsuit, and he failed to ensure the records’  
9 preservation. (Doc. 415.)

10 “A federal trial court has the inherent discretionary power to make appropriate  
11 evidentiary rulings in response to the destruction or spoliation of relevant evidence,”  
12 including instructing the “jury to draw an adverse inference from the destruction or  
13 spoliation against the party or witness responsible for that behavior.” *Glover v. BIC*  
14 *Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993). Adverse inference instructions are supported  
15 by two rationales, one evidentiary and one prophylactic. *Akiona v. United States*, 938  
16 F.2d 158, 161 (9th Cir. 1991). From an evidentiary perspective, “a party who has notice  
17 that a document is relevant to litigation and who proceeds to destroy the document is  
18 more likely to have been threatened by the document than is a party in the same position  
19 who does not destroy the document.” *Id.* From a prophylactic perspective, “[a]llowing  
20 the trier of fact to draw [an adverse] inference presumably deters parties from destroying  
21 relevant evidence before it can be introduced at trial.” *Id.* “[A] finding of ‘bad faith’”  
22 supports an adverse inference instruction but “is not a prerequisite.” *Glover*, 6 F.3d at  
23 1329. However, if there is no showing of bad faith and no showing that the evidence was  
24 destroyed in response to the litigation, an adverse inference instruction is improper. *See*  
25 *Akiona*, 938 F.2d at 161.

26 The only claim remaining in this case is Plaintiff’s First Amendment retaliation  
27 claim; Plaintiff’s Eighth Amendment claims relating to the conditions of confinement he

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28 <sup>1</sup> Defendant’s alleged failure to produce the November 24, 2015 email is the subject of  
Plaintiff’s Request for Order to Show Cause (Doc. 410), discussed below.

1 faced in the detention unit were dismissed on summary judgment. (*See* Docs. 255, 275.)  
2 The Court has found that the conditions of confinement that Plaintiff encountered in the  
3 detention unit are relevant to the “adverse action” and “chilling effect” elements of  
4 Plaintiff’s First Amendment retaliation claim. (Doc. 255 at 29, 31-32; Doc. 323 at 4.)  
5 However, Plaintiff can testify to those conditions and can offer evidence regarding the  
6 ADC policies that mandated those conditions.

7 The probative value of the form 804-3 records to elucidate the conditions of  
8 confinement in the detention unit is limited—the records would show when Plaintiff was  
9 offered out-of-cell recreation time, and Plaintiff asserts that the records could be cross-  
10 referenced with some objective record of outdoor temperatures to show that Plaintiff was  
11 offered out-of-cell recreation time during cold weather. (*See* Doc. 263 at 3-4; Doc. 273 at  
12 5.) Absent any actual conflict at trial concerning the conditions of confinement in the  
13 detention unit, such a convoluted, time-intensive method of introducing conditions-of-  
14 confinement evidence would be inadmissible based on Federal Rule of Evidence 403  
15 concerns, including undue delay, wasting time, and needlessly presenting cumulative  
16 evidence. The probative value of evidence of the form 804-3 records would be higher if  
17 Defendant presents testimony or evidence contradicting Plaintiff’s testimony and  
18 evidence concerning a lack of access to warm clothing during out-of-cell recreation time  
19 in cold weather. However, at this time, the Court has no reason to suspect that Defendant  
20 will present such evidence.

21 Accordingly, Defendant’s Motion in Limine re: Spoliation will be granted to the  
22 extent that Plaintiff will be precluded from arguing or offering testimony that anyone at  
23 the ADC destroyed or failed to preserve Plaintiff’s form 804-3 records. Furthermore, the  
24 Court is not inclined to give an adverse inference instruction based on the destruction of  
25 Plaintiff’s form 804-3 records.<sup>2</sup> However, the Court may revisit this ruling depending on

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26 <sup>2</sup> With respect to an adverse inference instruction, the Court notes that the evidence of  
27 record indicates the ADC routinely destroyed form 804-3 records after a certain period.  
28 The Court found in its January 21, 2021 Order that there is no evidence that Defendants  
acted willfully or in bad faith in destroying the records. (Doc. 273 at 5-6.) However, it is  
not clear whether ADC employees destroyed Plaintiff’s form 804-3 records after the  
ADC had received notice of Plaintiff’s lawsuit in this case, and Defendant has offered

1 the nature of the testimony and evidence presented at trial.

2 **II. Request for Order to Show Cause**

3 Plaintiff asks the Court to order Defendant Dusek and the Arizona Attorney  
4 General's Office to show cause why the Court should not hold them in civil contempt  
5 based on Defendant's failure to produce an email concerning Plaintiff that Dusek  
6 allegedly sent to the prison mental health department on November 24, 2015. (Doc. 410.)  
7 Plaintiff argues that Dusek indicated in a November 24, 2015 Information Report that he  
8 had sent the email to the mental health department, but that Defendant has refused to  
9 disclose the email to Plaintiff. (*Id.*) Plaintiff argues that Defendant's failure to disclose  
10 the email violates the Court's Scheduling Order, which reminds the parties of their duty  
11 under Federal Rule of Civil Procedure 26(e) to supplement all Rule 26(a) disclosures and  
12 discovery responses. (*Id.* at 8-10.) Plaintiff further argues that Rule 26(a)(1)(A) requires  
13 a party, "without awaiting a discovery request," to provide to the other parties a copy or  
14 description of all evidence "that the disclosing party has in its possession, custody, or  
15 control and may use to support its claims or defenses unless the use would be solely for  
16 impeachment." (*Id.* at 9.)

17 Plaintiff's Request for Order to Show Cause raises a discovery dispute. Discovery  
18 closed nearly three years ago. (Doc. 133.) The Court's Scheduling Order states: "Absent  
19 extraordinary circumstances, the Court will not entertain discovery disputes after the  
20 deadline for completion of discovery." (Doc. 84 at 3.) Plaintiff does not explain why he  
21 waited until days before a firm trial date to bring this discovery dispute to the Court's  
22 attention. He certainly has not presented any extraordinary circumstances showing why  
23 the Court should entertain this discovery dispute at such a late juncture. Furthermore,  
24 Plaintiff fails to identify any specific discovery request to which the November 24, 2015  
25 email would be responsive. Rule 26(a)(1)(A) requires certain disclosures without  
26 awaiting a discovery request, but only with respect to evidence that the disclosing party  
27 may use to support its claims or defenses. Fed. R. Civ. P. 26(a)(1)(A)(ii). There is no

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 little information regarding the ADC's failure to preserve Plaintiff's form 804-3 records.

1 indication that Defendant intends to use the November 24, 2015 email to support his  
2 defenses, and therefore disclosure of the email was not required under Rule 26(a)(1)(A).  
3 Plaintiff's Request for Order to Show Cause will be denied.

4 **III. Request for Judicial Notice**

5 Plaintiff requests that the Court take judicial notice of ADC Department Order  
6 804-3. (Doc. 414.) In a previous Motion, Plaintiff also requested that the Court take  
7 judicial notice of ADC Department Orders 704, 805, and 909. (Doc. 402.) At a pretrial  
8 conference held on April 18, 2022, the Court found that ADC policies such as the  
9 department orders at issue are an appropriate subject of judicial notice. *See* Fed. R. Evid.  
10 201(b); *Mangiaracina v. Penzone*, 849 F.3d 1191, 1193 n.1 (9th Cir. 2017); *United States*  
11 *v. Thornton*, 511 F.3d 1221, 1229 n.5 (9th Cir. 2008). However, the Court noted that  
12 Plaintiff would need to lay foundation for and establish the relevance of the ADC  
13 Department Orders. Upon further reflection after the pretrial conference, the Court  
14 determined that Plaintiff should seek to introduce the ADC Department Orders into  
15 evidence as exhibits at trial. To do so, Plaintiff must lay foundation and establish  
16 relevance. If any issues arise regarding the introduction of the policies into evidence, the  
17 Court may re-visit the issue of judicial notice.

18 **IT IS ORDERED** that Defendant's Motion in Limine re: Spoliation (Doc. 400) is  
19 **granted**. However, the Court may re-visit this ruling depending on the nature of the  
20 evidence and testimony presented at trial.


21 **IT IS FURTHER ORDERED** that Plaintiff's Request for Order to Show Cause  
22 (Doc. 410) is **denied**.

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**IT IS FURTHER ORDERED** that Plaintiff's Request for Judicial Notice (Doc. 414) is **denied without prejudice**.

Dated this 27th day of April, 2022.

  
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Honorable Rosemary Márquez  
United States District Judge